1931
Mar. 20—Petition received and filed. Taxpayer notified. (Fee paid)

" 21—Copy of petition served on General Counsel.

Apr. 25—Answer filed by General Counsel.

May 2—Copy served—assigned to General Calendar.

1932
Sep. 21—Hearing set Oct. 12, 1932.

Oct. 12—Hearing had before J. M. Sternhagen, Div. 10. Submitted on the merits. Stipulation of facts and attached exhibits filed. Briefs due Nov. 22, 1932—December 1, 1932 for reply. Exchange by counsel.

" 19—Transcript of hearing of Oct. 12, 1932 filed.

Nov. 22—Brief filed by taxpayer. Copy served 11/23/32.

" 22—Brief filed by General Counsel.

" 30—Motion for extension for 10 days to file reply brief filed by taxpayer. 11/30/32 granted.

Dec. 12—Reply brief filed by taxpayer.

1933
Jun. 30—Opinion rendered, John M. Sternhagen, Div. 10. Judgment will be entered under Rule 50.

Jul. 29—Motion for rehearing filed by General Counsel. 8/1/33 granted.

Sep. 1—Motion to set aside order granting respondent's motion for rehearing filed by taxpayer. 9/29/33 denied.

Sept. 29—Memorandum to accompany denial of motion of petitioner (filed Sept. 1, 1933) filed.

Oct. 17—Rehearing set Nov. 8, 1933.

Oct. 25—Motion for leave to amend answer, amendment tendered, filed by General Counsel. 10/27/33 granted.

Oct. 26—Motion to refer to full Board, Judge Sternhagen's decision on petitioner's motion, filed by taxpayer.

Nov. 7—Order denying taxpayer's motion of 10/26/33 entered.

Nov. 8—Hearing had before Mr. Sternhagen on rehearing—respondent closes on rehearing. Petitioner moves for judgment as per deficiency notice—denied. Statement of recomputation petitioner has been served by respondent—no contest—Judgment will be entered.

2

Nov. 13—Judgment entered, J. M. Sternhagen, Div. 10.

Nov. 14—Transcript of hearing of Nov. 8, 1933 filed.

1934

Feb. 5—Notice of withdrawal of J. Marvin Haynes and appearance of Oscar Mitchell as counsel filed.

Feb. 5—(1) Petition for review by United States Circuit Court of Appeals, 8th Circuit, with assignments of error filed by taxpayer.

Feb. 5—(1) Proof of service filed by taxpayer.

Mar. 10—Praecipe with proof of service thereon filed.

Mar. 20—Copy of order from 8th Circuit, directing transcript of proceedings to be incorporated into transcript, filed.

April 5—Order enlarging time to May 15, 1934 for transmission and delivery of record, sur petition for review, entered.

May 2—Mandate from United States Circuit Court of Appeals, 8th Circuit, reversing Board's decision filed.

May 6—Order that parties proceed forthwith as under Rule 50, in order that mandate shall be made effective, and a judgment entered pursuant thereto, entered.

May 15—Order enlarging time to July 2, 1934 for transmission and delivery of record sur petition for review, entered.

May 23—Motion that action in this proceeding be delayed until action on writ of certiorari is made, filed by taxpayer.

June 7—Motion to rescind order dated May 6, 1935 filed by taxpayer.

June 15—Transcript of record sent clerk U. S. Circuit Court of Appeals, St. Louis, Missouri.

1935

Dec. 30—Memorandum rendered, J. M. Sternhagen, Div. 10, that it is unnecessary to set case for hearing, pending stipulation, petitioner's Brief due 1/30/36. Respondent's 2/17/36.

1936

Jan. 20—Motion to put down for oral argument and for continuance to file briefs. An extension of 10 days for petitioner's brief after the date of oral argument and 20 days after date of argument for respondent's brief, filed by taxpayer.

Jan. 20—Notice of the appearance of Homer Hendricks counsel for taxpayer.

Jan. 21—Motion of Jan. 20, 1936, to change time for filing briefs denied. Oral argument granted, Feb. 20, 1936.

Jan. 28—Brief filed by taxpayer. 1/29/36 copy served.

Feb. 3—Copy of order from 8th Circuit ordering Mandate of Supreme Court (affirming judgment of this Court) be filed and spread upon record of this Court and transmitted to Board, filed.

Feb. 14—Supplemental brief filed by General Counsel.

Feb. 18—Notice of the appearance of James G. Nye, counsel for taxpayer.

Feb. 20—Hearing had before Mr. J. M. Sternhagen, Div. 10. Submitted on oral argument pursuant to Opinion and Mandate of Supreme Court.

3

Feb. 24—Transcript of hearing of 2-20-36 filed.

Mar. 18—Opinion rendered, Mr. J. M. Sternhagen, Div. 10. Judgment will be entered under Rule 50.

Mar. 30—Order correcting opinion as to one word, entered.

Apr. 6—Notice of settlement filed by General Counsel.

Apr. 8—Hearing set Apr. 29, 1936, under Rule 50.

Apr. 17—Consent to settlement filed by taxpayer.

Apr. 18—Judgment entered, Mr. J. M. Sternhagen, Div. 10.

Jul. 3—Petition for review by United States Circuit Court of Appeals, 8th Circuit, with assignments of error filed by General Counsel.

July 6—Proof of service filed by General Counsel.

July 16—Proof of service filed by General Counsel.

Aug. 24—Motion for extension to 10/1/36 to prepare and transmit record filed by General Counsel.

Aug. 24—Order enlarging time to 10/1/36 to prepare and transmit record, entered.

Aug. 31—Praecipe filed with proof of service thereon.

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4 (Petition of Minnesota Tea Company for Appeal.)

(Filed March 20, 1931. U. S. Board of Tax Appeals.)

United States Board of Tax Appeals.

Minnesota Tea Company, Petitioner,
Docket No. 54227. vs.
Commissioner of Internal Revenue, Respondent.

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (IT:AR:D-3; SON-60D) dated January 26, 1931, and as a basis of its proceeding alleges as follows:

1. The petitioner is a corporation with principal office at 2023 West Superior Street, Duluth, Minnesota.

2. The notice of deficiency (a copy of which is attached and marked Exhibit A) was mailed to the petitioner on January 26, 1931.

3. The taxes in controversy are income taxes for the year 1928 and in the amount of $11,587.64.

4. The determination of tax set forth in the said notice of deficiency is based upon the following errors:

The respondent has erroneously included in taxable income an amount of $106,471.73 representing an alleged profit realized from the transfer of petitioner's assets in a reorganization.

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

5 (a) On August 23, 1928, in pursuance of a plan of reorganization, petitioner transferred all of its assets to Grand Union Company and received in exchange therefor 18,000 shares of common stock of said Grand Union Company plus $426,842.52 in cash.

(b) Petitioner in pursuance of the plan of reorganization, immediately distributed all of the cash to its stockholders.

(c) Petitioner's stockholders assumed liabilities of the corporation amounting to $106,471.73.

(d) Respondent has added to petitioner's taxable income an amount of $106,471.73, representing an alleged profit realized by the petitioner upon the above transfer of assets.

(e) If the amount of $106,471.73 is excluded from petitioner's taxable income, petitioner sustained a net loss for the year 1928.

6. Wherefore, the petitioner prays that this Board may hear the proceeding and

(a) Exclude from petitioner's taxable income the amount of $106,471.73.

(b) Disallow the deficiency of $11,587.64.

(c) Afford such further relief as the nature of the case may require and to the Board may seem equitable and proper.

J. MARVIN HAYNES,
Counsel for Petitioner,
916 Investment Bldg.,
Washington, D. C.

Of Counsel:
Lybrand, Ross Bros. & Montgomery,
C. J. McGuire,
W. C. Magathan.

Dated, March 18, 1931.

6 State of Minnesota,
County of St. Louis—ss.:

E. C. Peterson, being duly sworn, says that he is president of Minnesota Tea Company, and is duly authorized to verify the foregoing petition; that he has read the foregoing petition, or had the same read to him, and is familiar with the statements contained therein, and that the facts stated are true, except as to those facts stated to be upon information and belief, and those facts he believes to be true.

E. C. PETERSON.

Subscribed and sworn to before me this 18th day of March, 1931.

(Seal)

S. H. ECKMAN,
Notary Public.

7 Exhibit A.

Treasury Department
Washington

January 26, 1931.

Office of
Commissioner of Internal Revenue

Minnesota Tea Company,
2023 West Superior Street,
Duluth, Minnesota.

Sirs:

In accordance with the provisions of section 273(a) of the Revenue Act of 1928, there has been assessed against you an income tax amounting to $11,587.64 for the taxable period January 1, 1928 to August 24, 1928, the details of which are set forth in the statement attached.

In accordance with section 272 of the Revenue Act of 1928, notice is hereby given to the deficiency mentioned. Within sixty days (not counting Sunday as the sixtieth day) from the date of the mailing of this letter, you may petition the United States Board of Tax Appeals for a redetermination of your tax liability.

Respectfully,

DAVID BURNET, Commissioner,
By J. C. Wilmer.

Enclosures:
Statement
Schedule

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8 Statement

IT:AR:D-3
SON-60D

In re: Minnesota Tea Company
2023 West Superior Street,
Duluth, Minnesota.

Tax Liability

Period	Correct Tax Liability	Tax Previously Assessed	Deficiency
January 1, 1928 to August 24, 1928	$11,587.64	None	$11,587.64

Reference is made to the report of the internal revenue agent in charge, St. Paul, Minnesota disclosing no change in your tax liability for the period indicated.

You are advised that this office may not approve the recommendation of the agent in charge, of which you were advised under date of August 25, 1930 that your return for the period ended August 24, 1928 be accepted as correct.

The reasons for this action are as follows:

This office holds that a taxable profit resulted to the Minnesota Tea Company from the disposition of its assets and business on August 23, 1928 to the Grand Union Company in exchange for stock of the latter and a sum in cash, whereas the examining officer held that the transaction was a reorganization under section 112 (i) (1) (B) of the Revenue Act of 1928 and resulted in no gain or loss to the Minnesota Tea Company or the Peterson Investment Company.

The facts in the case show that prior to such disposition of its assets, the Minnesota Tea Company formed, or caused to be formed, the Peterson Investment Company, and on July 14, 1928, certain assets were transferred by your corporation to the latter corporation in exchange for the entire capital stock of the latter. The assets so transferred to the newly formed corporation consisted of real estate and buildings, investments, and certain other assets. Immediately upon receipt of such stock by your corporation it was distributed pro rata among its stockholders.

The remaining assets in the Minnesota Tea Company were transferred to the Grand Union Company on August 23, 1928, in exchange for 18,000 shares of common stock in said Grand Union Company and a payment in cash in the amount of $426,842.52. The aforesaid 18,000 shares of common stock in the Grand Union Company constituted less than a majority of the outstanding shares of stock in said company. The following resolution was adopted at a special meeting of the stockholders of the Minnesota Tea Company held on August
9 22, 1928, with respect to the disposition of the aforesaid cash received by said company:

"Resolved further that all moneys received by Minnesota Tea Company on such sale of its assets and in consideration thereof, whenever received, shall be immediately distributed to the stockholders of Minnesota Tea Company ratably and in the proportion of their respective stockholdings in Minnesota Tea Company upon the assumption by the stockholders of all the corporate debts of Minnesota Tea Company in order to enable the company to hold all the corporate stock or securities received by it for its assets on such sale thereof without being compelled to sell any part of the same, and the Board of Directors are hereby authorized and directed to so dis-

tribute the said moneys as aforesaid and in behalf of the company enter into a written agreement with the stockholders, signed and executed by the company and all the stockholders whereby said stockholders, in consideration of such distribution and for the purpose of enabling the company to continue to hold the said corporate stock and securities without being compelled to sell any part thereof for the payment of existing debts, agree to pay all the corporate debts of the Minnesota Tea Company whether due and payable or not and whether certain or contingent."

The facts at hand show that the Minnesota Tea Company owed debts amounting to $106,471.73 and that on August 23, 1928 it distributed the first cash received through the following journal entry:

"Dr.	Reserve for Appreciation of Goodwill	$256,348.90	
	Notes payable	25,000.00	
	Accounts payable	73,918.46	
	A. F. Peterson	130.58	
	L. T. Peterson	1,613.74	
	E. C. Peterson	4,779.78	
Cr.	Cash		$361,791.46

"To record distribution to stockholders in accordance with plan of reorganization adopted and ratified at meeting of the stockholders on 8/22/28 of the cash received and assumption of the liabilities by the stockholders in accordance with agreement.

"From this it will be noted that the stockholders accounts payable were paid in cash by the corporation through the above journal entry, and the balance of the liabilities were paid by the stockholders after the above distribution.

10 "There is a difference of $1,029.17 between the total liabilities above and the amount of $106,471.73 which was adjusted at the time the balance of the sale price of $426,842.52 was received."

From the foregoing, it is to be assumed that the entire amount of cash received by the Minnesota Tea Company from the Grand Union Company was distributed to the stockholders in the Minnesota Tea Company, who paid the debts of said latter corporation out of the moneys received, said stockholders retaining out of said moneys the following amounts in their capacity as creditors of said corporation:

A. F. Peterson	$ 130.58
L. T. Peterson	$1,613.74
E. C. Peterson	$4,779.78

After the distribution of the cash received from the sale of its assets, the Minnesota Tea Company had nothing on its books except the stock in the Grand Union Company. The corporate structure of the Minnesota Tea Company had not changed. It is still a going concern, and its stock is held by the same persons as before the sale.

With reference to the transfer of a portion of its assets to the Peterson Investment Company, since the Minnesota Tea Company or its stockholders or both were in complete control of the transferee immediately after the transfer, said transaction clearly constituted a reorganization under section 112 (i) (1) (B) of the Revenue Act of 1928, to which both of said corporations were parties. No taxable gain resulted to the Minnesota Tea Company from this transaction under section 112 (b) (4) of the Revenue Act of 1928. No gain was recognized to the stockholders in the Minnesota Tea Company under section 112 (g) of the aforesaid act. No gain was recognized to the Peterson Investment Company, said transaction being regarded as a purchase from the standpoint of said company. The cost or other basis of the stock in the Minnesota Tea Company to the stockholders therein should be allocated or apportioned between that stock and the stock in the Peterson Investment Company, in the ratio or proportion of the respective values thereof as of the effective date of the distribution to the stockholders of the stock in the latter, as provided in article 600 of Regulations 74, as amended by Treasury Decision 4274, Cumulative Bulletin VIII-2, page 240. Under section 112 (a) (7) of the 1928 Act the basis of the assets transferred by the Minnesota Tea Company to the Peterson Investment Company is the same as said assets had in the hands of the Minnesota Tea Company.

11 Minnesota Tea Company.

Schedule 1.

Net loss reported on return	($9,908.07)
Additional income:	
Profit on disposition of assets	106,471.73
Net income adjusted	$ 96,563.66

Explanation of Changes

For details see statement.

Schedule #2.

Computation of Tax.

Net income adjusted	$96,563.66
Tax at 12%	11,587.64
Tax previously assessed	none
Deficiency in tax	$11,587.64

12 With reference to the transfer of the remaining assets to the Grand Union Company on August 23, 1928, it is to be noted that said assets constituted all the properties then owned by the Minnesota Tea Company. Said transfer, therefore, falls within the definition of a reorganization as set out in section 112 (i) (1) (A) of the 1928 Act in that it was the acquisition by one corporation of all the properties of another corporation. Both the Minnesota Tea Company and the Grand Union Company were parties to said reorganization. General Counsel's Memorandum 3827, Cumulative Bulletin, VII-2, page 114.

The Minnesota Tea Company, having distributed the entire $426,842.52 cash received by it to its stockholders in the manner hereinabove related, the question is presented, whether such distribution, to the extent that said money was used to pay the corporate debts in the amount of $106,471.73, including the debts of said corporation to its stockholders, fall within the meaning of the word "distribute" as it is used in section 112 (d) (2) of the 1928 Revenue Act. To the extent that the stockholders were required to pay the corporate debts out of such money, they clearly could not be taxed on such income, nor would the basis of their stock be affected. Such distribution redounded to the benefit of the corporation as much as if the corporation itself had paid its corporate debts out of said cash received, and distributed the balance to its stockholders as ordinary or liquidating dividends.

The effect of using the money to pay the corporate debts, whether paid directly by the corporation to the creditors, or by the corporation to its stockholders who in turn paid the creditors, would be to increase the value of the corporate property to the extent of the debts paid. In other words, the corporation, from an economic standpoint, would retain the benefit of the cash received just as if it had kept said cash and left its debts outstanding. The Bureau has, heretofore, taken the position that the word "distribute" does not include a distribution to creditors. This being true, it seems to logically follow that a distribution to stockholders for the benefit of creditors falls within the same category.

In the light of the foregoing it is the opinion of this office that the word "distribute" as used in section 112 (d) (2) of the 1928 Act can reasonably and should be interpreted to mean a distribution to stockholders to be used for their own benefit, and not a distribution to or for the benefit of creditors, and that the Minnesota Tea Company did not distribute the cash received by it to the extent of the amount of its debts, namely, $106,471.73, within the meaning of section 112 (d) (2) of the 1928 Act.

13 The basis of the assets transferred by the Minnesota Tea Company to the Grand Union Company was $199,016.09, taxable gain in the amount of $106,471.73 was realized by the Minnesota Tea Company as a result of the transaction between it and the Grand Union Company, under the provisions of section 112 (d) (2) of the 1928 Revenue Act. The basis of the stock in the Grand Union Company in the hands of the Minnesota Tea Company must be determined under section 113 (a) (6) of the Revenue Act of 1928. No gain or loss was recognized to the Grand Union Company, the transaction being regarded as a purchase from the standpoint of said company.

In view of the fact that there has been a transfer of your assets, the Bureau will be unable to afford you an opportunity under the provisions of article 1211 of Regulations 69 and/or article 451 of Regulations 74 to discuss your case before mailing formal notice of its determination as provided in sections 274 and 279 of the Revenue Act of 1926 and/or sections 273 and 274 of the Revenue Act of 1928 and it is, therefore, necessary at this time in order that the interests of the Government may be protected to issue this formal notice of deficiency.

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14 (Answer of Commissioner of Internal Revenue.)

(Filed April 25, 1931, United States Board of Tax Appeals.)

The Commissioner of Internal Revenue by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer admits, alleges and denies as follows:

1 and 2. Admits the allegations of paragraphs 1 and 2 of the petition.

3. Alleges that the notice of deficiency dated January 26, 1931, sets forth a deficiency in income tax amounting to $11,587.64 for the period January 1, 1928 to August 24, 1928.

4. Denies the allegations of paragraph 4 of the petition, and further denies that the respondent erroneously determined the tax liability of the petitioner for the said period.

5. (a) to (e), inclusive. Denies any knowledge or information sufficient to form a belief as to the truth of the allegations of paragraphs 5 (a) to (e), inclusive, of the petition, and therefore denies the same.

6. Denies generally and specifically each and every allegation of the petition not hereinbefore admitted or denied.

Wherefore, it is prayed that the appeal be denied.

C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue.

Of Counsel:

Hartford Allen,
Special Attorney,
Bureau of Internal Revenue.

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15 (Opinion of United States Board of Tax Appeals.)

United States Board of Tax Appeals.

Minnesota Tea Company, Petitioner,
Docket No. 54227. vs.
Commissioner of Internal Revenue, Respondent.

Promulgated March 18, 1936.

A corporation exchanged its assets in a statutory reorganization for shares of the transferee corporation and money, and immediately distributed all the money pursuant to a resolution which provided that the shareholders should assume the corporate debts. The shareholders discharged the corporate debts. Held, that the money thus received must be regarded as entirely distributed to shareholders and no part thereof may be regarded as recognizable gain of the corporation.

James G. Nye, Esq., and Homer Hendricks, Esq., for the petitioner.

George D. Brabson, Esq., for the respondent.

Opinion.

STERNHAGEN: In this proceeding, the Board, in Minnesota Tea Co., 28 B. T. A. 591, held, upon the stipulated facts, that there was no statutory reorganization, and this decision pre-

cluded consideration of the taxpayer's contest of the Commissioner's original determination of deficiency. The Board's decision was reversed, Minnesota Tea Co. vs. Commissioner, 76 Fed. (2d) 797; Helvering vs. Minnesota Tea Co., ... U. S. ..... (December 16, 1935). The proceeding is now here under mandate for consideration of the original issue.

The question is whether gain is to be recognized to the extent of $106,471.73 of the cash received, that being the amount of the corporate debts which were assumed and discharged by the shareholders. In 1928 the petitioner, in the statutory reorganization, transferred its assets to the Grand Union Co. for 18,000 shares of Grand Union stock and $426,842.52 money. The corporation was committed, by a resolution adopted the preceding day, to turn over the money immediately to its shareholders. The resolution is as follows:

Resolved further that all moneys received by Minnesota Tea Company on such sales of its assets and in consideration thereof, whenever received, shall be immediately distributed to the stockholders of Minnesota Tea Company ratably and in the proportion of their respective stockholdings in Minnesota Tea Company upon the assumption by the stock-
16 holders of all the corporate debts of Minnesota Tea Company in order to enable the company to hold all the corporate stock or securities received by it for its assets on such sale thereof without being compelled to sell any part of the same, and the Board of Directors are hereby authorized and directed to so distribute the said moneys as aforesaid and in behalf of the company enter into a written agreement with the stockholders, signed and executed by the company and all the stockholders whereby said stockholders, in consideration of such distribution and for the purpose of enabling the company to continue to hold the said corporate stock and securities without being compelled to sell any part thereof for the payment of existing debts, agree to pay all the corporate debts of the Minnesota Tea Company whether due and payable or not and whether certain or contingent.

The money was turned over to the shareholders. The corporate debts amounted to $106,471.73. The evidence does not contain the written agreement required by the resolution, but it is stipulated that the amount of the liabilities was assumed and discharged by the shareholders.

The petitioner contends that immediately upon the receipt of the Grand Union shares and the $426,842.52, it distributed the money in pursuance of the plan of reorganization, and that the situation is squarely within section 112 (d) (1), Rev-

enue Act of 1928,[1] providing that "no gain shall be recognized." The respondent urges that the shareholders' assumption of the corporate debts prevents the amount of $106,471.73 from being regarded as a distribution by the corporation, and hence that it may not escape recognition as part of the corporation's gain.

Taking the resolution at its face, it provides for two things: (1) the "distribution" to the shareholders of all the money received in the reorganization, and (2) an "agreement" by the shareholders to pay the corporate debts. Both were carried out. Apparently neither the terms of the resolution nor the actual conduct of the parties justifies treating these promises as condition one upon the other. Jacob & Youngs, Inc. vs. Kent, 230 N. Y. 239; 129 N. E. 889; Restatement of the Law, Contracts, § 261; Williston on Contracts, § 665. The legal effect of a dividend resolution which embodies such a shareholders' promise is not clear, cf. Lindgrove vs. Schluter & Co., 256 N. Y. 439; 176 N. E. 832;
17 Thomas vs. Matthews, 94 Ohio St. 32; 113 N. E. 669, but even if we treat the relation between the petitioner and its shareholders as if it were contractual, there is no reason to say that the failure of the shareholders to perform the promise would avoid or rescind the distribution. The corporation was not liquidating, and it had assets consisting of the 18,000 shares of Grand Union stock plus $426,842.52 in cash (approximately $966,000), entirely ample to justify a dividend of $426,842.52 and payment of its debts of $106,471.73, Clarence LeBus, 1 B. T. A. 733; cf. O. B. Barker, 3 B. T. A. 1180. Under these circumstances, breach of the shareholders' promise would give the corporation no more than (if as much as) a remedy in damages. This would leave the dividend unaffected as to character or amount.

The Government argues that, of the distribution, $106,471.73 must be regarded as charged with the payment of the debts, or as a trust fund appropriated to that purpose, and that in neither event is it, properly speaking, a distribution.

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[1] Sec. 112. Recognition of Gain or Loss.

* * * * * * *

(d) *Same—gain of corporation.*—If an exchange would be within the provisions of subsection (b) (4) of this section if it were not for the fact that the property received in exchange consists not only of stock or securities permitted by such paragraph to be received without the recognition of gain, but also of other property or money, then—

(1) If the corporation receiving such other property or money distributes it in pursuance of the plan of reorganization, no gain to the corporation shall be recognized from the exchange, but

* * * * * * *

The corporation, until the actual discharge of its debts, remained the primary debtor. No attempt was made to secure the consent of the creditors to a substitution of obligor. The corporation continued to own the 18,000 Grand Union shares, worth over $500,000. What then is the foundation for a trust? Ordinary legal remedies were available for the ample protection of all parties. The corporation was neither liquidating nor impoverishing itself. Its liability persisted until payment. There was no occasion, either as to the corporation or as to the shareholders, for a trust. Against the shareholders, the corporation had, if there was a juristic promise, a remedy at law if they failed to pay the debts. The shareholders, upon the receipt of the $426,842.52 cash, had the right to use it as they chose and to fulfill their promise to the corporation in any way they might elect, without being required to use the distribution to pay the debts. If, indeed, the shareholders were able by negotiation to discharge the debts for less than their book or face value, they were still entitled to retain the amount of the distribution.

The regulations adopted pursuant to the Revenue Act of 1928 deal no more specifically with the present state of facts than does the statute itself, nor is any light to be derived from the Congressional reports as to the Revenue Bill of 1924, which first carried the statutory provision, i. e., Revenue Act of 1924, section 203 (e) (H. R. rept. No. 179, Committee on Ways and Means, 68th Cong., 1st sess. p. 15; and S. rept. No. 398, Committee on Finance, 68th Cong., 1st sess. p. 16). When considering the changes proposed from the existing Revenue Act of 1921, the House Committee on Ways and Means had before it a statement by A. W. Gregg, special assistant to the Secretary of the Treasury,[2] which illuminates the intendment of the act finally passed, and indicates that since the petitioner was in fact "a

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[2] Sec. 203 (e): There is no provision of the existing law which corresponds to subdivision (e) of the bill, nor has the Treasury Department ever ruled officially on the type of case covered by that subdivision. The subdivision provides that if a corporation in connection with a reorganization transfers its assets to another corporation, a party to the reorganization, for stock and securities of the same corporation and cash, then no gain or loss to the transferor is recognized, if it distributes the cash to its stockholders. But if the selling corporation fails to distribute the cash to its stockholders then the gain or loss is to be recognized. In other words, if the corporation which sells its assets in connection with the reorganization acts merely as a conduit in passing the proceeds of the sale on to its stockholders, no gain to the corporation is to be recognized, but if it retains the entire amount of proceeds with the result that the transaction is in substance a real sale, then the gain shall be recognized.

A corporation in connection with a reorganization may dispose of its assets in one of three ways: It may transfer them to a new corporation in exchange for stock or cash; it may transfer them to the new corporation, the consideration being the payment by the new corporation of stock or cash to the stockholders of the old corporation; or the new corporation may buy, with its stock and cash,

mere conduit'' through which the money passed from the Grand Union Co. to the shareholders, any gain to the petitioner which it embraced should escape recognition. Argument is presented to establish that this legislative history justifies a construction broad enough to include a distribution among creditors as well as among shareholders. This view has its advocates,[3] but it is not necessary that it be directly decided in this proceeding, for, as we have seen, the petitioner did not provide for or make a distribution among its creditors and did not secure from its creditors a release from its obligations. When a corporation used money thus received in a reorganization for the purpose of directly discharging its bonded indebtedness, it was held that such use was not a statutory distribution. Liquidating Co., 33 B. T. A.— (No. 174). But the proposition that the corporation's direct payment to its bondholders is not a statutory distribution does not carry the corollary that the shareholders' promise to discharge the corporation's current debts had the same effect, and changes the distribution made to them into a discharge by the corporation of its debts, converting, so
19 to speak, the actual distribution pro tanto into a constructive nondistribution.

The Government urges that since the Tea Co. in fact had a gain of $712,195.90 (see 28 B. T. A. 591), all of which would be taxable but for the special statutory provisions for nonrecognition, the nonrecognition may only extend to cases clearly within the statute, and that the taxpayer is charged with the burden of bringing himself within the nonrecognition provision. This is a correct general statement (Sarther Grocery Co., 22 B. T. A. 1273; affd., 63 Fed. (2d) 68; Arctic Ice Machine Co., 23 B. T. A. 1223; 67 Fed. (2d) 983; Edison Securities Corporation, 29 B. T. A. 483; 78 Fed. (2d) 85). Liter-

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from the stockholders of the old corporation their stock and then liquidate the old corporation. If a corporation adopts the first method, its gain from the sale could be taxed. If it adopts the second method, the gain probably could be taxed on the theory of constructive receipt by the selling corporation. If it adopts the third method, there is no theory on which any gain to the old corporation could be taxed. As a result of these considerations, subdivision (e) has been so drafted that the tax liability on the selling corporation is the same no matter which of the three methods set out above is adopted. In other words, if the selling corporation is a mere conduit through which the consideration for the sale of the assets passes, or if the consideration for the sale of the assets is paid direct to the stockholders of the old corporation, without passing through the conduit, no gain or loss to the old corporation is recognized, and the same result is reached that would have to be reached necessarily if the transaction were accomplished through the medium of a purchase by the new corporation of the stock of the old corporation followed by a liquidation of the old.

[3] Paul and Mertens, Law of Federal Income Taxation, Vol. 2, § 17,102;
Miller, Reorganizations and Other Exchanges in Income Taxation, § 134;
Montgomery, Federal Income Tax Handbook, 1935-1936, p. 202;
Cf. Baar and Morris, Hidden Taxes in Corporate Reorganizations, ch. 12, § 15.

ally, however there was an express distribution of all the money among the shareholders, and it is the respondent who seeks to depart from the recognition of the facts and to call the actual distribution which was made a constructive payment of corporate debts. It can not readily be said that to avoid recognition of the gain is contrary to any purpose manifest in the statute. The dominating purpose of the reorganization provisions of the statute is elusive. It is far from clear enough to prevent the recognition of an express distribution because it has the effect of lowering the corporation's tax.

Reviewed by the Board.

Judgment will be entered under Rule 50.

ARUNDELL, dissenting: The question in this case is whether the petitioner meets the provisions of section 112 (d) (1) of the Revenue Act of 1928 to the extent of $106,471.73 of the cash received by it from the Grand Union Co., which was the amount of the corporate debts assumed and discharged by the petitioner's stockholders. The majority opinion holds that it does. I cannot agree with that holding.

First: The recent case of the Liquidating Co., 33 B. T. A. —(No. 174) decides directly against the suggestion that a distribution among creditors may come within the statute, holding that cash received in a reorganization and used to redeem the taxpayer's debentures was not distributed within the meaning of the cited section. To the same effect is West Texas Refining & Developing Co. vs. Commissioner, 68 Fed. (2d) 77.

Second: If the above proposition is sound, there would not be a different rule where the corporation turns the money over to others to use to pay its debts. Whatever the legal relation of the recipients to the taxpayer, they would be liable for payment of the debts at the instance of the creditors. Lawrence vs. Fox, 20 N. Y. 268; Hendrick vs. Lindsay et al., 93 U. S. 143. Their liability in this respect would not
20 depend on the solvency or insolvency of the taxpayer nor upon whether or not the liability of the taxpayer persisted. I think it a misconstruction of the provisions of the resolution to say that the distribution by the corporation and the agreement by the stockholders to assume the debts were not conditioned upon each other. The part of the resolution quoted consists of one sentence. In the first part it is resolved "that all money * * * be immediately distributed * * * upon the assumption by the stockholders of all the corporate debts." In the second part the directors are au-

thorized and directed to distribute the money accordingly and to enter into an agreement with the stockholders whereby the stockholders "in consideration of such distribution * * * agree to pay all the corporate debts." To me it seems clear from this language that the distribution is expressly conditioned upon the assumption of the corporate debts by the stockholders and they took the distribution subject to this condition. A dividend resolution "is to be taken as it emanates from the board. A part of it cannot be taken and the rest discarded." State vs. B. & O. R. R., 6 Gill (Md.) 363, 386, quoted in General Utilities & Operating Co., 29 B. T. A. 934; affd., ... U. S. ..... Thus, in the final analysis the petitioner merely used its stockholders as a conduit for payment of its debts, and gain realized and used for this purpose cannot escape tax under the reorganization provisions of the statute. Liquidating Co., supra.

BLACK, MCMAHON, TURNER, MELLOTT, and ARNOLD agree with this dissent.

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21 Order Correcting Opinion.

United States Board of Tax Appeals
Washington

Minnesota Tea Company, Petitioner,
Docket No. 54227. vs.
Commissioner of Internal Revenue, Respondent.

To correct an error, it is

Ordered that the opinion promulgated March 18, 1936, be and hereby it is corrected by inserting in the sixth paragraph, the fifth sentence, the word "not", preceding the last three words thereof, so that as corrected the sentence will read, "When a corporation used money thus received in a reorganization for the purpose of directly discharging its bonded indebtedness, it was held that such use was not a statutory distribution." It is further

Ordered that the original of the official opinion be corrected by interlining the word "not" at the place hereinbefore designated.

Dated March 30, 1936.

(Seal of U. S. Board of Tax Appeals.) JOHN M. STERNHAGEN, Member.

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22 (Order of Redetermination, April 17, 1936.)

United States Board of Tax Appeals
Washington

Minnesota Tea Company, Petitioner,
Docket No. 54227. vs.
Commissioner of Internal Revenue, Respondent.

Subsequent to the Board's report, promulgated March 18, 1936, the respondent filed a proposed judgment, which the petitioner agrees is in accordance with the said report. It is, therefore,

Ordered, Adjudged and Decided that there is no deficiency in income tax for the period January 1, 1928, to August 24, 1928.

Enter

Entered April 17, 1936.

(Seal of U. S. Board of Tax Appeals.) JOHN M. STERNHAGEN, Member.

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23 (Petition of Guy T. Helvering, Commissioner of Internal Revenue, for Review of Decision of United States Board of Tax Appeals.)

(Filed July 3, 1936, United States Board of Tax Appeals.)

In the United States Circuit Court of Appeals for the Eighth Circuit.

Guy T. Helvering, Commissioner of Internal Revenue, Petitioner on Review.
No. 54227. vs. B. T. A.
Minnesota Tea Company, Respondent on Review.

To the Honorable Judges of the United States Circuit Court of Appeals for the Eighth Circuit:

Now Comes Guy T. Helvering, Commissioner of Internal Revenue by his attorneys, Robert H. Jackson, Assistant Attorney General, Herman Oliphant, General Counsel for the Department of the Treasury and George D. Brabson, Special Attorney, Bureau of Internal Revenue, and respectfully shows:

I.

Your petitioner on review hereinafter referred to as the Commissioner, is the duly appointed, qualified, and acting Commissioner of Internal Revenue of the United States.

Your respondent on review, hereinafter referred to as the taxpayer, is a corporation organized under the laws of the State of Minnesota with its principal office and place of business at Duluth, Minnesota, and filed its income tax return for the year in question with the Collector of Internal Revenue for the District of Minnesota, whose office is located in the City of St. Paul, Minnesota, and within the judicial circuit of the United States Circuit Court of Appeals for the Eighth Circuit.

II.

24 The Commissioner determined a deficiency of Federal income taxes against the taxpayer for the period January 1 to August 24, 1928, in the amount of $11,587.64, and on January 26, 1931, in accordance with the provisions of Section 272, Revenue Act of 1928, sent to the taxpayer by registered mail a notice of said deficiency. Thereafter, on March 21, 1931, the taxpayer filed an appeal from said notice of deficiency with the United States Board of Tax Appeals, being Docket No. 54227.

On June 30, 1933, the Board of Tax Appeals promulgated its opinion and on November 13, 1933, entered its final order and decision wherein and whereby the Board of Tax Appeals ordered and decided that the transaction in question did not constitute a statutory reorganization within the meaning of the Revenue Acts, and that the taxpayer was subject to tax upon the entire amount of the profit realized from the sale of its assets to Grand Union Company, and upon the basis of an amended answer filed by the Commissioner in order to conform said answer to the proof, found a deficiency in tax against the taxpayer in the amount of $72,686.90 for the period January 1, 1928, to August 24, 1928.

An appeal therefrom was taken by the taxpayer to this Honorable Court which under date of March 25, 1935, rendered its decision, reversing the Board of Tax Appeals upon the issue of the statutory reorganization and remanded the case to the Board of Tax Appeals for further proceedings in accordance therewith. The Commissioner thereupon petitioned for a writ of certiorari to the Supreme Court of the United States which petition was granted, and under date of December 16, 1935, the Supreme Court rendered its decision affirming the decision of this Honorable Court.

25

The case was thereupon remanded to the Board of Tax Appeals for further proceedings in accordance with the mandate.

A second hearing of the case was thereupon had before the Board of Tax Appeals which on March 18, 1936, promulgated its opinion and on April 17, 1936, entered its final order and decision wherein and whereby the Board of Tax Appeals ordered and decided that the deficiency determined by the Commissioner in his notice of deficiency was erroneous, and that there was no deficiency against the taxpayer for the period in question. The opinion of the Board of Tax Appeals is reported in 34 B. T. A.,—No. 21.

III.

The nature of the controversy is as follows:

Taxpayer is a Minnesota Corporation with its principal office and place of business at Duluth, Minnesota. Prior to August 24, 1928, taxpayer was engaged in the business of selling tea and coffee.

On July 14, 1928, in anticipation of the subsequent sale of its business taxpayer transferred to Peterson Investment Company, a new corporation organized for the purpose by the taxpayer, all its lands, buildings, investments, and certain other assets at book value, receiving in exchange therefor all of the outstanding shares of common stock of said investment company. Immediately thereafter the taxpayer distributed all said common stock to its shareholders pro rata.

26 On August 23, 1928, taxpayer sold its remaining business assets having a book value of $199,016.09, to the Grand Union Company, a Delaware Corporation, for which taxpayer received $426,842.52 in cash and 18,000 shares of common stock of Grand Union Company having a fair market value on that date of $33.00 per share.

Immediately after the foregoing sale was consummated taxpayer by corporate resolution voted to disburse the cash received on the sale to its stockholders upon the express undertaking of the stockholders to assume and pay all outstanding indebtedness of the taxpayer amounting to $106,471.73. The cash was disbursed and $106,471.73 was used by the stockholders to pay said indebtedness.

In the proceeding before the Board taxpayer contended that the $106,471.73 was a distribution of corporate earnings within the meaning of Section 112 (d) (1) and being pursuant to a plan of reorganization the gain to the corporation was not recognized.

The Commissioner contended before the Board that the $106,471.73 was disbursed to the stockholders for the specific purpose of paying the corporate debts, that the stockholders assumed its obligations and paid them, and that the $106,471.73 was charged with the payment of said debts and impressed with a trust for that purpose, and hence it could not constitute a distribution of earnings within the meaning of the statute.

The Board held that all of the cash disbursed by taxpayer to its stockholders constituted a statutory distribution regardless of the conditions imposed upon the $106,471.73 in question, and regardless of how said disbursement of cash was used by the stockholders.

IV.

27 The Commissioner says that in the record and proceedings before the Board of Tax Appeals and in the decision and final order of redetermination entered by the Board manifest error occurred and intervened to the prejudice of the Commissioner and the Commissioner hereby assigns the following errors which he avers occurred in said record, proceedings, decision and final order of redetermination so entered by the Board, to-wit:

1. The Board erred in holding that funds disbursed by a corporation to its stockholders for the purpose of paying corporate debts is a distribution of gain or profits.

2. The Board erred in holding that a disbursement of funds by a corporation to its stockholders for the purpose of paying corporate debts was not a disbursement for the benefit of such creditors.

3. The Board erred in holding that the sum of $106,471.73 received by the stockholders for the purpose of paying the corporate debts of the Minnesota Tea Company constituted a distribution to said stockholders within the meaning of Section 112 (d), Revenue Act of 1928.

4. The Board erred in failing to hold that such a disbursement was in effect impressed with a trust for the benefit of such creditors.

5. The Board erred in holding that the disbursement of said funds to the stockholders was not conditioned upon the agreement of the stockholders to pay the corporate debts.

6. The Board erred in failing to hold that the agreement of the stockholders to pay the corporate debts prevented the

disbursement of $106,471.73 from becoming a statutory distribution.

7. The Board erred in holding that the burden of proof was upon the respondent to show the nature of said disbursement.

8. The Board erred in failing to hold that the burden of proof was upon the petitioner to show the nature of said disbursement.

9. The Board erred in failing to hold for the respondent upon the facts stipulated in the case.

Wherefore, the Commissioner petitions that the decision and final order of the Board of Tax Appeals be reviewed by the United States Circuit Court of Appeals for the First Circuit, that a transcript of the record be transmitted to the Clerk of said court for filing, and that appropriate action be taken to the end that the errors complained of may be reviewed and corrected by the said court.

ROBERT H. JACKSON,
Assistant Attorney General.

HERMAN OLIPHANT,
General Counsel for the Department of the Treasury.

GEORGE D. BRABSON,
Special Attorney,
Bureau of Internal Revenue.

MFH
7/1/36

United States of America,
District of Columbia.—ss.:

George D. Brabson, being duly sworn, says that he is a special attorney in the office of the General Counsel for the Department of the Treasury, and as such is duly authorized to verify the foregoing petition for review; that he has read said petition and is familiar with the contents thereof; that said petition is true of his own knowledge except as to the matters therein alleged on information and belief, and as to those matters he believes it to be true.

GEORGE D. BRABSON.

Sworn and subscribed to before me this Second day of July, 1936.

My commission expires: Nov. 16, 1937.

GEORGE W. KREIS,
Notary Public.

GDB:MFH
7/1/36

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30 (Notice of Filing of Petition for Review and Service on Counsel for Respondent.)

(Filed July 6, 1936, United States Board of Tax Appeals.)

To:

Homer Hendricks, Esq.,
920 Southern Building,
Washington, D. C.

You are hereby notified that the Commissioner of Internal Revenue did, on the 3rd day of July, 1936, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Eighth Circuit, of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 3rd day of July, 1936.

HERMAN OLIPHANT,
General Counsel for the
Department of the Treasury.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of errors mentioned therein, is hereby acknowledged this 6th day of July, 1936.

HOMER HENDRICKS,
Attorney for Respondent on Review.

MFH
7/1/36

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31 (Notice of Filing of Petition for Review and Service on Respondent.)

(Filed July 16, 1936, United States Board of Tax Appeals.)

To:

Minnesota Tea Company,
2023 West Superior Street,
Duluth, Minnesota.

You are hereby notified that the Commissioner of Internal Revenue did, on the 3rd day of July, 1936, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Eighth Circuit, of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and the assignments of error as filed is attached hereto and served upon you.

Dated this 3rd day of July, 1936.

HERMAN OLIPHANT,
General Counsel for the
Department of the Treasury.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of errors mentioned therein, is hereby acknowledged this 7 day of July, 1936.

MINNESOTA TEA COMPANY,
By E. C. Peterson, Pres.
Respondent on Review.

MFH
6 7/3/36

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32 Agreed Statement of Fact.

(Filed at Hearing October 12, 1932, U. S. Board of Tax Appeals.)

United States Board of Tax Appeals.

Minnesota Tea Company, Petitioner,
Docket No. 54227. vs.
Commissioner of Internal Revenue, Respondent.

It is hereby stipulated and agreed by and between Minnesota Tea Company, petitioner, and the Commissioner of Internal Revenue, respondent, by their respective attorneys,

that the following facts shall be taken as true, provided, however, that this stipulation shall be without prejudice to the right of either party to introduce other and further evidence not at variance with the facts herein stipulated.

1. The petitioner is a Minnesota corporation with principal office at 2023 West Superior Street, Duluth, Minnesota, engaged in the business of selling teas, coffees, and groceries at retail.

2. On July 14, 1928, the petitioner formed, or caused to be formed, the Peterson Investment Company, a corporation, and transferred thereto certain of its assets in exchange for the entire capital stock of Peterson Investment Company. The assets so transferred to the newly formed corporation consisted of real estate and buildings, investments and
33 other miscellaneous assets. Immediately upon receipt of the stock of Peterson Investment Company it was distributed by petitioner pro rata among its stockholders.

3. The organization of Peterson Investment Company, and the subsequent action described in paragraph 2 immediately preceding, was accomplished in accordance with a resolution of the stockholders of Minnesota Tea Company, adopted on June 18, 1928, a copy of which is attached hereto, made a part hereof, and marked Exhibit F.

4. On August 23, 1928, petitioner transferred all of its assets to Grand Union Company, another corporation, and received in exchange therefor 18,000 shares of common stock of said Grand Union Company, plus $426,842.52 in cash.

5. The transfer effected as described in paragraph 4, immediately preceding, was accomplished in accordance with the following plan:

(a) On August 22, 1928, the stockholders of Minnesota Tea Company adopted a resolution, a copy of which is attached hereto, made a part hereof, and marked Exhibit A.

(b) A copy of the option dated July 2, 1928, referred to in the aforedescribed resolution is attached hereto, made a part hereof, and marked Exhibit B.

(c) On August 22, 1928, the Directors of Minnesota Tea Company adopted a resolution, a copy of which is attached hereto, made a part hereof, and marked Exhibit C.

(d) On July 6, 1928, the option of July 2, 1928, was accepted by O. B. Westphal, Esq., who in all of the transactions

with Minnesota Tea Company was acting as agent for Grand Union Company.

34 (e) On July 24, 1928, an agreement supplemental to the option of July 2, 1928, was accomplished, a copy of which is attached hereto, made a part hereof, and marked Exhibit D.

(f) Also attached hereto and made a part hereof is a copy of the minutes of a stockholders meeting held on August 23, 1928, marked Exhibit E.

6. Upon receipt of such consideration, the petitioner immediately paid the entire sum of $426,842.52 so received, to its stockholders in proportion to their stockholdings.

7. Said payment was made pursuant to the following resolution adopted at a special meeting of the stockholders of petitioner held on August 22, 1928, at which the aforesaid reorganization was approved by the stockholders:

"Resolved further that all moneys received by Minnesota Tea Company on such sales of its assets and in consideration thereof, whenever received, shall be immediately distributed to the stockholders of Minnesota Tea Company ratably and in the proportion of their respective stockholdings in Minnesota Tea Company upon the assumption by the stockholders of all the corporate debts of Minnesota Tea Company in order to enable the company to hold all the corporate stock or securities received by it for its assets on such sale thereof without being compelled to sell any part of the same, and the Board of Directors are hereby authorized and directed to so distribute the said moneys as aforesaid and in behalf of the company enter into a written agreement with the stockholders, signed and executed by the company and all the stockholders whereby said stockholders, in consideration of such distribution and for the purpose of enabling the company to continue to hold the said corporate stock and securities without being compelled to sell any part thereof for the payment of existing debts, agree to pay all the corpo-
35 rate debts of the Minnesota Tea Company whether due and payable or not and whether certain or contingent."

8. The amount of the liabilities of the petitioner at August 23, 1928, which were assumed and discharged by the stockholders of petitioner, pursuant to the foregoing quoted resolution, was $106,471.73.

9. Respondent in determining the proposed deficiency herein added to petitioner's taxable income an amount of

$106,471.73, representing an alleged profit realized upon the above transfer of assets to Grand Union Company.

10. If the said amount of $106,471.73 so added by the Commissioner to petitioner's taxable income, be excluded therefrom, petitioner sustained a net loss for the year 1928.

C. J. McGUIRE,
Attorney for Petitioner.

C. M. CHAREST,
General Counsel,
Attorney for Respondent.

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36 Exhibit A.

Minutes of the special meeting of the stockholders of Minnesota Tea Company, held at its office in the City of Duluth, Minnesota, on the 22nd day of August, 1928, at ten o'clock in the forenoon.

Pursuant to the call of the president a special meeting of the stockholders of the company was held at its offices, in the City of Duluth, Minn., on August 22nd, 1928, at ten o'clock in the forenoon, after all the stockholders in writing had mutually agreed and consented to the holding of such meeting and waived notice of the time and place and the purposes of such meeting required by the by-laws of the company and the statutes of the state.

All the stockholders were present during the meeting and participated therein and in the proceedings.

E. C. Peterson presided and A. F. Peterson acted as the secretary thereof.

The president reported to the meeting that it was advisable that all the assets of the company should be sold under the option dated July 2, 1928, given by the president and secretary to O. B. Westphal as modified by an agreement dated July 24th, 1928, upon the terms therein set out, except that, as the company has conveyed all its real estate, the lease specified in such option shall be made by Peterson Investment Company, the owner of the property, and further that it was advisable to distribute to the company's stockholders all the moneys received on such sale, whenever received by the company, ratably according to their stockholdings, and that the stockholders should assume the corporate debts to enable it to hold all the corporate stock or securities received.

After a full discussion and consideration of the matters relating to such reorganization and in order to effect such reorganization by the sale of the company's assets for corporate securities or stock and moneys and the distribution of the moneys to the stockholders and the retention by the company of all the said stock and securities, a written resolution was read and its adoption moved, seconded and carried by the unanimous vote of all the stockholders. Such resolution was of words and tenor as follows:

"Resolved that the written option, dated July 2nd, 1928, and made by the President and Secretary of the company, in behalf of Minnesota Tea Company, to O. B. Westphal, signed by said officers and said O. B. Westphal, and the written agreement, dated July 24th, 1928, and made by said officers of the company and said O. B. Westphal, modifying the said option, be and hereby are ratified, confirmed and approved, and that the actions of the President and Secretary in giving and executing such option and in signing and executing such agreement modifying said option be and are hereby in all things ratified, confirmed and approved.

Resolved further that the assets of Minnesota Tea Company described in said option, being all, or substantially all, the assets of Minnesota Tea Company, be sold and delivered to said O. B. Westphal, or his nominee, in pursuance of and under such option and agreement modifying the same and on the terms therein stipulated and thereby agreed and for the consideration therein and thereby stipulated, or upon such other terms as may be deemed advisable by the board of directors, and that any other assets, if any there be, owned by, or in the disposition of, Minnesota Tea Company be sold or assigned by this company to the purchaser of the assets specified in said option, if possible, upon such terms as may be obtained.

37 Resolved further that the Board of Directors be and hereby are authorized and directed to effect and make such sale and transfer of all the assets of Minnesota Tea Company upon the terms and for the considerations stipulated in said option and agreement modifying the same, or upon such other terms as the Board of Directors, or the president, by the board thereto authorized, may deem advisable.

Resolved further that the Board of Directors, in order to effect such sale of said assets of this company, and to carry out the terms of said option as modified and of the terms of any agreement, hereby authorized, relative thereto, be and are hereby authorized and directed to cause to be executed

and delivered to the purchaser of said assets, in behalf of and by Minnesota Tea Company, any bill of sale, assignments, agreements or other instruments by the President and the Secretary and to cause Peterson Investment Company to execute the lease specified in said option to The Grand Union Company on terms satisfactory to The Grand Union Company.

Resolved further that all moneys received by Minnesota Tea Company on such sale of its assets and in consideration thereof, whenever received, shall be immediately distributed to the stockholders of Minnesota Tea Company ratably and in the proportion of their respective stockholdings in Minnesota Tea Company upon the assumption by the stockholders of all the corporate debts of Minnesota Tea Company in order to enable the company to hold all the corporate stock and securities received by it for its assets on such sale thereof without being compelled to sell any part of the same, and the Board of Directors are hereby authorized and directed to so distribute the said moneys as aforesaid and in behalf of the company enter into a written agreement with the stockholders, signed and executed by the company and all the stockholders whereby said stockholders, in consideration of such distribution and for the purpose of enabling the company to continue to hold the said corporate stock and securities without being compelled to sell any part thereof for the payment of existing debts, agree to pay all the corporate debts of Minnesota Tea Company whether due and payable or not and whether certain or contingent.

Resolved further that Minnesota Tea Company shall continue to own and hold the said corporate stock and securities without the sale or distribution thereof."

It was then moved, seconded and carried by the vote of the stockholders that the written consent to the holding of the special meeting and the waiver of notice of the holding thereof and the written resolution adopted at the meeting be copied into the minutes of the meeting and that said written consent and waiver and said written resolution adopted be filed with the files and records of the company.

The said written consent and waiver were of the following words and tenor:

We, the undersigned, being all the stockholders of Minnesota Tea Company, do hereby mutually consent to the holding of a special meeting of the stockholders of Minnesota Tea Company and its stockholders at the office of the corporation, in the City of Duluth, Minnesota, for any purpose, or

purposes, that may affect the corporation and its business, as called by the President, and we waive any and every notice, or notices, of such meeting and of the purpose thereof required by the statutes of Minnesota or the By-Laws of the corporation.

Dated August 22, 1928.

E. C. PETERSON,
L. T. PETERSON,
A. F. PETERSON.

38 The meeting of the stockholders adjourned on motion made and carried.

A. F. PETERSON,
Secretary,

Attest:

E. C. PETERSON,
President.

The undersigned, being all the stockholders of Minnesota Tea Company do hereby certify that the foregoing minutes are true and correct.

E. C. PETERSON,
L. T. PETERSON,
A. F. PETERSON.

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39 (Praecipe for Transcript.)

(Filed August 31, 1936, United States Board of Tax Appeals.)

To the Clerk of the United States Board of Tax Appeals:

You will please prepare, transmit and deliver to the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, copies duly certified as correct of the following documents and records in the above-entitled cause in connection with the petition for review by the said Circuit Court of Appeals for the Eighth Circuit, heretofore filed by the Commissioner of Internal Revenue:

1. Docket entries of the proceedings before the Board.

2. Pleadings before the Board, including:

(a) Petition, including annexed copy of deficiency letter:

(b) Answer.

3. Opinion of the Board promulgated March 18, 1936, and decision of the Board entered April 17, 1936.

4. Petition for review, together with proof of service of notice of filing petition for review, and of service of a copy of petition for review.

5. Stipulation of facts filed August 12, 1932, at the original hearing of the case, and Exhibit A, filed at said hearing (resolution of stockholders).

6. Orders enlarging time for preparation of the evidence and for the transmission and delivery of the record.

40 7. This praecipe.

HERMAN OLIPHANT,
General Counsel for the
Department of the Treasury.

Service of a copy of the within praecipe is hereby admitted this 26th day of Sept., 1936.

JAMES G. NYE,
Attorney for Respondent.

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41 (Clerk's Certificate to Transcript.)

United States Board of Tax Appeals
Washington

Commissioner of Internal Revenue, Petitioner,
Docket No. 54227. vs.
Minnesota Tea Company, Respondent.

I, B. D. Gamble, clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages, 1 to 40, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal as above numbered and entitled.

Seal
U. S. Board of
Tax Appeals
1924

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 23d day of September, 1936.

B. D. GAMBLE,
Clerk, United States Board of Tax Appeals.

Filed Sep. 26, 1936. E. E. Koch, Clerk.

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34 And thereafter the following proceedings were had in said cause in the Circuit Court of Appeals, viz.:

(Appearance of Mr. Herman Oliphant as Counsel for Petitioner.)

United States Circuit Court of Appeals
Eighth Circuit.

Guy T. Helvering, Commissioner, etc., Petitioner,
No. 10,763. vs.
Minnesota Tea Company.

The Clerk will enter my appearance as Counsel for the Petitioner.

HERMAN OLIPHANT,
General Counsel for the Department of the Treasury,
Washington, D. C.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Oct. 3, 1936.

(Appearance of Mr. George D. Brabson as Counsel for Petitioner.)

The Clerk will enter my appearance as Counsel for the Petitioner.

GEORGE D. BRABSON,
Special Attorney, Bureau of Internal Revenue,
Washington, D. C.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Oct. 3, 1936.

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35 (Appearance of Mr. Robert H. Jackson and Mr. Sewall Key as Counsel for Petitioner.)

The Clerk will enter my appearance as Counsel for the Petitioner.

ROBERT H. JACKSON,
Assistant Attorney General.

SEWALL KEY,
Special Assistant to the Attorney General.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Oct. 5, 1936.

(Appearance of Mr. James W. Morris and Mr. Maurice J. Mahoney as Counsel for Petitioner.)

The Clerk will enter our appearances as Counsel for the Commissioner.

JAMES W. MORRIS,
Assistant Attorney General.

SEWALL KEY,
MAURICE J. MAHONEY,
Special Assistants to the Attorney General.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Jan. 25, 1937.

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36 (Appearance of Counsel for Respondent.)

The Clerk will enter my appearance as Counsel for the Respondent.

OSCAR MITCHELL,
JAMES S. NYE,
1200 Alworth Bldg., Duluth, Minn.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Oct. 7, 1936.

(Order of Submission.)

March Term, 1937.

This cause having been called for hearing in its regular order, argument was commenced by Mr. Maurice J. Mahoney, Special Assistant to the Attorney General, for petitioner, continued by Mr. James G. Nye for respondent, and concluded by Mr. Maurice J. Mahoney, Special Assistant to the Attorney General, for petitioner.

Thereupon, this cause was submitted to the Court on the transcript of the record from said Board of Tax Appeals and the briefs of counsel filed herein.

United States Circuit Court of Appeals
Eighth Circuit.

No. 10,763.—MARCH TERM, A. D. 1937.

Guy T. Helvering, Commissioner of Internal Revenue, Petitioner,
vs.
Minnesota Tea Company, Respondent.

On Petition to Review Decision of United States Board of Tax Appeals.

[April 7, 1937.]

Mr. Maurice J. Mahoney, Special Assistant to the Attorney General (Mr. Robert H. Jackson, Assistant Attorney General, and Mr. Sewall Key, Special Assistant to the Attorney General, were with him on the brief) for petitioner.

Mr. James G. Nye (Mr. Oscar Mitchell and Messrs. Mitchell, Gillette, Nye & Harries were with him on the brief) for respondent.

Before STONE, GARDNER and WOODROUGH, Circuit Judges.

STONE, Circuit Judge, delivered the opinion of the court.

This is a petition for review of an order of the Board of Tax Appeals denying a redetermination of income tax for 1928 assessed against respondent by the Commissioner of Internal Revenue.

For years prior to 1928, respondent corporation had been engaged in retail business. On June 18, 1928, the stockholders of respondent (three in number) resolved to form a corporation to be known as the Peterson Investment Company. July 2nd, respondent gave an option on certain assets to the Grand Union Company. July 6th, this option was accepted. July 14th, the Peterson Investment Company was organized and its entire

stock acquired by respondent in exchange for the real estate, buildings, investments and some miscellaneous assets of respondent—the property so exchanged included all owned by respondent except the assets covered by the option. Such stock was immediately distributed to the three stockholders of respondent. July 24th, there was a supplemental agreement to the option between respondent and the Grand Union Company. August 22nd, a stockholders' meeting of respondent adopted a resolution whereby it was provided that all moneys received under the contracts with the Grand Union Company should be at once distributed to the three stockholders "in the proportion of their respective stockholdings" in respondent "upon the assumption by the stockholders of all the corporate debts of Minnesota Tea Company in order to enable the company to hold all the corporate stock [in the Grand Union Company] or securities received by it for its assets on such sale thereof without being compelled to sell any part of the same."(1) August 23rd, the contracts were performed by the transfer of all these assets of respondent to the Grand Union Company in return for 18,000 shares of common stock of that company and $426,842.52 in cash. Immediately, this cash was distributed to the three stockholders in proportion to their respective holdings in respondent and the stockholders assumed payment of like proportionate parts of the corporate indebtedness of respondent, amounting to $106,471.73. This assumed indebtedness has been paid by the stockholders.

Both the Commissioner and the taxpayer assumed this entire transaction to be a reorganization within Section 112 of the Revenue Act of 1928 (45 Stat. 791). Though so assuming, the Commissioner assessed a tax against $106,471.73, which was the indebtedness of respondent assumed and paid by its stockholders as above. Upon appeal by respondent to the Board of Tax Appeals, the Board, of its own volition, examined and determined that the transaction was not a reorganization within Section 112 but was

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(1) The resolution is as follows:

"Resolved further that all moneys received by Minnesota Tea Company on such sales of its assets and in consideration thereof, whenever received, shall be immediately distributed to the stockholders of Minnesota Tea Company ratably and in the proportion of their respective stock holdings in Minnesota Tea Company upon the assumption by the stockholders of all the corporate debts of Minnesota Tea Company in order to enable the company to hold all the corporate stock or securities received by it for its assets on such sale thereof without being compelled to sell any part of the same, and the Board of Directors are hereby authorized and directed to so distribute the said moneys as aforesaid and in behalf of the company enter into a written agreement with the stockholders, signed and executed by the company and all the stockholders whereby said stockholders, in consideration of such distribution and for the purpose of enabling the company to continue to hold the said corporate stock and securities without being compelled to sell any part thereof for the payment of existing debts, agree to pay all the corporate debts of the Minnesota Tea Company whether due and payable or not and whether certain or contingent."

a sale of assets by respondent to the Grand Union Company. On petition to review, this Court held the transaction was within Section 112 and remanded the matter to the Board for further proceedings (76 Fed. [2d] 797). The Supreme Court granted certiorari (296 U. S. 562) and affirmed the decision of this Court (296 U. S. 378).

On retrial, the Board determined there was no tax liability as to the $106,471.73, representing the above indebtedness. The Commissioner brings this petition for review to question that ruling.

The issue is well and concisely stated in the opinion of the Board as follows:

"The petitioner [taxpayer] contends that immediately upon the receipt of the Grand Union shares and the $426,842.52, it distributed the money in pursuance of the plan of reorganization, and that the situation is squarely within section 112(d)(1), Revenue Act of 1928, providing that 'no gain shall be recognized.' The respondent urges that the shareholders' assumption of the corporate debts prevents the amount of $106,471.73 from being regarded as a distribution by the corporation, and hence that it may not escape recognition as part of the corporation's gain."

The plan of reorganization is an exhibit introduced in evidence before the Board but not included in the record here. In view of the decision of the Supreme Court in this case and the tacit agreement of the parties that this payment to the stockholders was "in pursuance of the plan of reorganization", as required by Section 112(d), we assume this to be true and further consideration of the issue before us is based thereon. Without such assumption, we should have to have before us the "plan" and to determine whether this payment was *in pursuance* thereof.

The determination of the issue before us depends upon certain legal principles in conjunction with the construction of the Act here involved. Those principles are as follows. It is an exemption from taxation which is here claimed by respondent and upon it lies the burden of establishing the right thereto (*Gregory* v. *Helvering*, 293 U. S. 465, 469; *New Colonial Co.* v. *Helvering*, 292 U. S. 435, 440; *Bowers* v. *Lawyers Mortg. Co.*, 285 U. S. 182, 187); for income tax purposes, the component parts of a single transaction cannot be treated separately (*Bassick* v. *Commissioner*, 85 Fed. (2d) 8, 10, C. C. A. 2, certiorari denied 299 U. S. .....; *Ahles Realty Corp.* v. *Commissioner*, 71 Fed. (2d) 150, 151, C. C.

A. 2, certiorari denied 293 U. S. 611; *Prairie Oil & Gas Co.* v. *Motter,* 66 Fed. [2d] 309, 311, C. C. A. 10); payment of a debt is income to the debtor for taxation purposes *(Helvering* v. *Midland Mutual Life Ins. Co.,* ..... U. S. ..... [Feb. 15, 1937]; *Raybestos-Manhattan Co.* v. *United States,* 296 U. S. 60, 64; *Douglas* v. *Willcuts* 296 U. S. 1, 8; *Old Colony Trust Co.* v. *Commissioner,* 279 U. S. 716, 729; *United States* v. *Boston & Maine Railroad,* 279 U. S. 732, and applying this rule in reorganization matters and exchanges see *West Texas R. & D. Co.* v. *Commissioner,* 68 Fed. [2d] 77, 80, C. C. A. 10 and *The Liquidating Co.* v. *Commissioner,* 33 B. T. A. 1173, 1184); distribution within the reorganization provisions of the Revenue Acts means distribution to stockholders and not payment of corporate debts *(West Texas R. & D. Co.* v. *Commissioner,* 68 Fed. [2d] 77, 80, C. C. A. 10).

The reorganization provisions (Section 112[a] and [d]) of the Revenue Act of 1928 reveal (as pertinent here) the following: First, that the provisions that no gain or loss is recognized from certain exchanges do not grant an exemption and are not so intended but operate only as a postponement of the tax until gain is clearly realized by a future sale or exchange amounting thereto; Second, that where money and/or property, other than stock or securities in the new reorganized company or in a participating corporation, are received a gain from the exchange is recognized as realized but not in excess of such money and property; Third, that the provisions as to distribution to stockholders of such money and/or property had as a main purpose to prevent tax evasions through distribution as capital gains what was in effect dividends out of earnings—thus avoiding higher surtax rates. These three conclusions as to the construction of the statute are based on the wording of the Act and the clarifying Congressional Reports.(2)

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(2) The provisions of the Act of 1928 here pertinent are essentially the same as in the Act of 1924 (June 2, 1924, 43 Stat. 253) though the section numbers differ. The Committee Reports upon the Act of 1924 are revealing and pertinent. The reorganization provisions in that Act are mostly in Section 203 with related matters in Sections 201(c)(d) and 204(a)(6)-(9). Extracts from these reports are as follows:

"CHANGES DESIGNED TO PREVENT THE AVOIDANCE OF THE INCOME TAX.

Consistent with the principle of imposing an income tax which can be collected, a tax which is an actuality and not a pretense, the committee recommends certain amendments to the income tax law to stop the methods of avoidance which are now being commonly availed of by taxpayers.

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(2) The provisions of the reorganization section have been rewritten to prevent the use of the section to escape proper taxation by increasing the basis for depreciation or depletion or by increasing the basis for determining gain or loss from the sale of assets transferred in connection with a reorganization or by distributing as capital gains what are in effect dividends out of earnings." (H. R. No. 179, pp. 6 and 7 and 44; S. R. #398, p. 7).

"Section 203(d):

(1) Paragraph (1) of Subdivision (d) corresponds to section 202 (e) of the existing law as amended by the act of March 4, 1923, and provides that where

Applying the above principles of law and the three above conclusions to the situation here, there results the following: (a) respondent received, along with 18,000 shares of stock in the Grand Union Company, $426,842.52 in cash; (b) this cash, if undistributed by respondent to its stockholders, would have constituted a realization upon the exchange to that amount and, therefore, would be subject to taxation against it as gain in so far as it constituted a capital gain; (c) if this entire amount be distributed absolutely to the stockholders, they and not it would be subject to such realization and to taxation thereon, under the applicable provisions of the Act, as upon individual incomes; (d) respondent received an advantage from the acquisition of this money from the Grand Union in that it secured the payment of its indebtedness in the sum of $106,471.73; (e) the payment of this indebtedness by the stockholders was a condition attached to and

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'boot' is given in connection with an exchange which would otherwise be tax free, the gain from the exchange shall be recognized, but in an amount not in excess of the amount of the money or other 'boot'.

(2) There is no provision of the existing law which corresponds to paragraph (2) of subdivision (d). This subdivision provides that any amount distributed by a corporation in connection with a reorganization which has the effect of a taxable dividend shall be taxed as a dividend and not as a taxable gain.

The necessity for this provision may best be shown by an example: Corporation A has capital stock of $100,000, and earnings and profits accumulated since March 1, 1913, of $50,000. If it distributes the $50,000 as a dividend to its stockholders, the amount distributed will be taxed at the full surtax rates.

On the other hand, corporation A may organize corporation B, to which it transfers all its assets, the consideration for the transfer being the issuance by B of all its stock and $50,000 in cash to the stockholders of corporation A in exchange for their stock in corporation A. Under the existing law, the $50,000 distributed with the stock of corporation B would be taxed, not as a dividend, but as a capital gain, subject only to the 12½ per cent rate. The effect of such a distribution is obviously the same as if the corporation had declared out as a dividend its $50,000 earnings and profits. If dividends are to be subject to the full surtax rates, then such an amount so distributed should also be subject to the surtax rates and not to the 12½ per cent rate on capital gain. Here again this provision prevents evasions.

Section 203(e):

There is no provision of the existing law which corresponds to subdivision (e) of the bill, nor has the Treasury Department ever ruled officially on the type of case covered by that subdivision. The subdivision provides that if a corporation in connection with a reorganization transfers its assets to another corporation, a party to the reorganization, for stock and securities of the same corporation and cash, then no gain or loss to the transferor is recognized, if it distributes the cash to its stockholders. But if the selling corporation fails to distribute the cash to its stockholders then the gain or loss is to be recognized. In other words, if the corporation which sells its assets in connection with the reorganization acts merely as a conduit in passing the proceeds of the sale on to its stockholders, no gain to the corporation is to be recognized, but if it retains all or any of the proceeds with the result that the transaction is in substance a real sale, then all or a part of the gain shall be recognized." (H. R. #179, pp. 14 and 52; S. R. #398, p. 15).

"BASIS FOR DETERMINING GAIN OR LOSS.

Section 204:

(1) There is no provision in the existing law which corresponds to paragraph (3). This paragraph applies the same principles to transfers to a trustee as is applied in paragraph (2) to gifts, and provides that where property was acquired after December 31, 1920, by a transfer in trust, the basis for determining the gain or loss from its sale shall be the same as it would be in the hands of the grantor.

(2) Paragraph (6) corresponds to section 202(d)(1) of the existing law. The general theory of this section is that where no gain or loss is recognized as resulting from an exchange, the new property received shall, for purposes of determining gain or loss from a subsequent sale and for depreciation and depletion, be considered as taking the place of the old property given up in

governing the distribution(3); (f) such payment was thus assumed and was made; (g) such payment reduced, by $106,471.73, the amount realized by the stockholders for their own benefit on the distribution; (h) respondent received the full benefit of this payment to the same extent as though it had retained that amount from distribution and applied it to payment of such indebtedness; (i) this sum cannot be regarded as gain to the stockholders and they could not be taxed individually therefor; (j) this was not a genuine distribution of this sum but a circuitous retention and application thereof by the respondent; (k) it is taxable to the respondent.

"Where the legal effect of a transaction fits the plain letter of the statute, the tax is held payable, unless there is clearly revealed in the Act itself or in its history a definite intention to exclude such transactions from the operation of its applicable language" (*Helvering* v. *Midland Mutual Life Ins. Co.*, ... U. S. ..... [Feb. 15, 1937]) and (from the same opinion) "There is nothing unfamiliar in taxing on the basis of the legal effect of a transaction."

The result is that the determination of the Board must be reversed and the cause remanded to the Board with instructions to set aside the order here under review and to proceed to ascertain the amount, if any, of gain by respondent from the transaction with the Grand Union and of the tax due (up to $106,471.73) upon such gain.

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connection with the exchange. The provisions of section 203 of the bill that no gain or loss is recognized from certain exchanges do not grant an exemption and are not so intended. These provisions are based upon the theory that the types of exchanges specified in section 203 are merely changes in form and not in substance, and consequently should not be considered as affecting a realization of income at the time of the exchange. In other words, these provisions result not in an exemption from tax but in a postponement of tax until the gain is realized by a pure sale or by such an exchange as amounts to a pure sale. It follows, therefore, that in the case of such an exchange the property received should be considered as taking the place of the property exchanged. If in connection with the exchange money is received which is not taxed, obviously the basis at which the old property is carried on the books of the taxpayer should be reduced to that extent, since the taxpayer has in part received a return of capital. But if money is received in connection with the exchange and the money is taxed, it is equally obvious that the basis of the old property should not be affected." (H. R. #179, pp. 16 and 54; S. R. 398, p. 17).

(3) The resolution authorizing the distribution provided that this money should be distributed ratably to the stockholders "upon the assumption by the stockholders of all the corporate debts of Minnesota Tea Company" and the Board of Directors of respondent were "hereby authorized and directed to so distribute the said moneys as aforesaid" and to enter into a written agreement with the stockholders "whereby said stockholders, in consideration of such distribution * * * to pay all the corporate debts of the Minnesota Tea Company * * *."

44 (Decree.)

United States Circuit Court of Appeals
Eighth Circuit.

March Term, 1937.

Thursday, April 8, 1937.

Guy T. Helvering, Commissioner of Internal Revenue,
Petitioner,
No. 10,763. vs.
Minnesota Tea Company.

On Petition to Review Decision of United States Board of Tax Appeals.

This cause came on to be heard on the petition for review of an order of the United States Board of Tax Appeals denying a redetermination of income tax for 1928 assessed against the respondent, and was argued by counsel.

On Consideration Whereof, It is now here ordered, adjudged and decreed by this Court that the order of the said Board of Tax Appeals in this cause, be, and the same is hereby, reversed, without the taxation of costs in favor of either of the parties in this Court.

And it is further ordered by this Court that this cause, be, and the same is hereby, remanded to the said Board of Tax Appeals to set aside the order here under review and to proceed to ascertain the amount, if any, of gain by respondent from the transaction with the Grand Union Company and of the tax due (up to $106,471.73) upon such gain.

April 8th, 1937.

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45 (Clerk's Certificate.)

United States Circuit Court of Appeals,
Eighth Circuit.

I, E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the record on petition to review the decision of the United States Board of Tax Appeals as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, and full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion, had and filed in the United States Circuit Court of Appeals, except the full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of

the United States, in a certain cause in said Circuit Court of Appeals wherein Guy T. Helvering, Commissioner of Internal Revenue, was Petitioner, and the Minnesota Tea Company was Respondent, No. 10,763, as full, true and complete as the originals of the same remain on file and of record in my office.

I do further certify that on the twenty-eighth day of April, A. D. 1937, a mandate was issued out of said Circuit Court of Appeals in said cause, directed to the United States Board of Tax Appeals.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this seventeenth day of May, A. D. 1937.

E. E. KOCH,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

(Seal)

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 11, 1937

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Black took no part in the consideration and decision of this application.